

Congress of the United States
Washington, DC 20515

September 25, 2008

Department of Health and Human Services
Office of Public Health and Science
Attn: Brenda Destro
Hubert Humphrey Building
200 Independence Avenue SW
Room 728E
Washington, DC 20201

Re: RIN 0991-AB48

Dear Ms. Destro:

We are writing to strongly object to a rule proposed on August 26, 2008 by the Department of Health and Human Services (HHS) that will significantly undermine patients' access to vital health services and information. The ill-conceived and unnecessary proposed rule puts politics and ideology before quality health care: It would expand the ability of health care providers to withhold treatment, counseling, or medical information based on their religious or moral beliefs without regard for the needs of the patient. The proposed rule broadens the scope and reach of existing federal refusal laws beyond Congressional intent, while creating confusion and uncertainty about the rights and obligations of patients, doctors, and health care institutions—not merely in the area of reproductive health but throughout the U.S. health care system. Because the proposed rule is a threat to the health care of women, their families, and all Americans, we urge you to halt all efforts to move it forward.

Background

In the proposed rule, HHS purports to educate recipients of Department funds about their legal obligations under three statutes—often referred to as the Church Amendments (42 USC 300a-7), the Coats Amendment (42 USC 238n), and the Weldon Amendment (Consolidated Appropriations Act 2008, PL 110-161, Div. G, 508d). These laws give individuals and institutions the ability to refuse to provide, or prohibit requiring the performance or participation in, health services or research activities contrary to personal religious beliefs or moral convictions.

While HHS states that the intent of the regulation is to clarify existing law, its expansive language and ambiguity will likely have the opposite effect. Rather than clarify the law, the proposed rule will lead to confusion for health care providers, state and local governments, and research institutions—which will undoubtedly struggle with the uncertain interaction between this proposed regulation and existing state and federal laws that address these issues.

This proposed rule is a solution in search of a problem. The American Board of Obstetrics and Gynecology (ABOG) recently issued a public statement vehemently denying charges by HHS that ABOG has required physicians to violate their conscience rights by providing or referring patients for abortion—erroneous charges that HHS used as a basis for issuing this unnecessary

rule. ABOG has also called on HHS to hold a hearing to reveal, among other things, actual cases of misconduct that the rule is intended to address which, to date, HHS has failed to provide to the public.

The Proposed Rule Fails to Clarify that Birth Control is Not a Target

Under an earlier draft of this rule in mid-July, HHS defined the term “abortion” to include commonly used FDA-approved methods of birth control. Rather than allay concerns over this language by including a definition of abortion consistent with the consensus of the medical community and existing federal policy, the proposed rule drops the abortion definition entirely. When asked to clarify that the regulation does not apply to birth control, HHS Secretary Leavitt stated: “This regulation does not seek to resolve any ambiguity in that area.”

The potential implications of this ambiguity are far-reaching. Like the leaked draft, the proposed rule leaves the door open for insurance plans, hospitals, and other entities to define abortion in any way they choose—including in ways that would include common forms of birth control. As a result, women could be denied access to birth control services, including counseling and information, even if state laws protect that access.

For example, if adopted, the proposed rule could undermine a state’s ability to enforce its own law requiring insurance plans that cover prescription drugs to cover birth control. It could create confusion for states administering Medicaid and the Title X programs because of existing program requirements ensuring access to contraceptive counseling and services; and it could create an opening for hospitals to refuse to comply with state laws requiring that sexual assault survivors be offered emergency contraception. In short, the proposal may well complicate the administration of longstanding and vital federal family planning programs, as well as state laws adopted to protect access to contraception.

The Proposed Rule Fails to Even Mention the Careful Balance Struck by Civil Rights Law

This proposed rule allows any employee of a health care provider to refuse to treat any individual if doing so would violate his or her religious beliefs or moral convictions—without any mention of the needs of the patient. In doing so, the proposed rule fails to address serious questions as to whether its purpose is to upset the careful balance between respecting employees’ religious beliefs and employers’ ability to provide their patients with access to health care currently maintained in federal law under Title VII of the Civil Rights Act of 1964.

Title VII provides a balance between employers’ need to accommodate their employees’ religious beliefs and practices—including their refusal to participate in specific health care activities to which they have religious objections—with the needs of the people the employer must serve. Under Title VII, employers have a duty to reasonably accommodate an employee or applicant’s religious beliefs or practices, unless doing so places an “undue hardship” on the employer’s business. This law provides protection for individual belief while still ensuring patients’ access to health care services. An extensive guidance just released in July 2008 by the Equal Employment Opportunity Commission (EEOC), the federal agency charged with the enforcement of Title VII and other key employment discrimination laws, discusses in great detail the scope of employers’ obligations to accommodate the religious beliefs of their employees.

Because the proposed rule fails to even mention Title VII or the comprehensive EEOC guidance, it will likely cause confusion and uncertainty among employees, employers and patients regarding their rights surrounding these refusals. The rule does not, for example, say what steps

an institution must take to reasonably accommodate an individual health provider's religious objection, nor whether there are any circumstances at all when the needs of the employer or its clients outweighs such an objection. Instead, it simply includes language prohibiting discrimination in specific circumstances against those who perform or assist with, or who refuse to perform or assist with, certain health services, and ignores the inevitable confusion and potential conflict with other employment protections.

The Proposed Rule Undermines Patients' Access to Information, Counseling, and Referrals

If this proposed rule is implemented, women seeking services at a health care facility that receives direct or indirect funds from HHS may no longer be assured that they will receive information about all of their health care options, including – but not limited to – the option of safe and legal abortion care. The rule allows a broad range of health care providers and entities to refuse even to counsel patients about options—thus denying information critical to informed consent and referrals to any other source of information or services.

For some entities, the refusal to counsel patients for services or provide medical information and options could extend to *any medical treatment*, beyond reproductive health care. For example, an oncologist working in a federally funded prostate cancer treatment program could withhold information from a patient about the option of extracting and freezing sperm before cancer treatment, if the oncologist personally objects to assisted reproduction. Indeed, health care professionals might rely on this rule to justify their refusal to provide information or counseling on services from vaccination to blood transfusion to end-of-life pain management. This proposed rule should not stand in the way of the information patients need to make health care decisions for themselves and their families, nor should it undermine providers' legal and ethical requirements to obtain patients' informed consent. As it stands, it threatens to fundamentally undermine the relationship between providers and patients, who will have no way of knowing which services, information, or referrals they may have been denied.

The Proposed Rule Does Not Even Protect Patients in Emergency Situations

The rule fails to address the obligations of individuals and entities in the case of medical emergencies. For example, the federal Emergency Medical Treatment and Labor Act (EMTALA) requires hospitals to at least stabilize patients who come to the ER in medical emergencies. The proposed rule offers no answers as to whether avoiding “discrimination” against a health care provider should be allowed to trump the need to treat a patient in a medical emergency. At best, this failure will cause confusion among employers. At worst, it could place patients in need of emergency medical care in grave harm.

The Proposed Rule Extends Broad Refusal Rights to an Expansive Array of Individuals and Institutions

The proposed rule expands the universe of health care individuals and institutions that may refuse to provide services. It also broadens the scope of what falls under a refusal under the applicable law. The proposed definition of “assist in the performance” states that it includes “counseling, referral, training, and other arrangements for the procedure, health service, or research activity.” Further, the definition of “workforce” extends the right to refuse not only to an entity's employees but also to volunteers and trainees.

Further, the regulation's definitions of “recipient” and “sub-recipient” would extend the laws' applicability even to “foreign or international organizations (such as agencies of the United

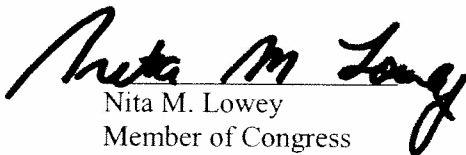
Nations)” without any reference or deference to existing federal law governing U.S. foreign policy. This could create confusion among federal agencies about which laws to follow and could lead to unforeseen foreign policy complications.

The Proposed Rule May Impede Biomedical and Behavioral Research

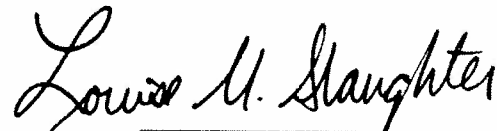
Finally, the proposed rule could have a substantial impact on research activities at federally-funded hospitals and academic, nonprofit and corporate research institutions. In the proposed rule, a broad array of HHS-funded entities, including post-graduate physician training programs, hospitals, laboratories, universities and think tanks, are prohibited from discriminating against any personnel who refuse to perform, or assist in, *any* research activity or service. Without additional guidance about how research institutions should balance the needs of their employees with the needs of their research programs—guidance along the lines of the long established framework provided currently to these institutions under Title VII—this proposed rule could adversely impact a wide range of research efforts.

The proposed rule is damaging to the health care of women, their families, and all Americans, and will only serve to cause havoc, not clarity, among employers and employees in the health care field. Again, we urge you to halt all efforts in moving forward with this rule.

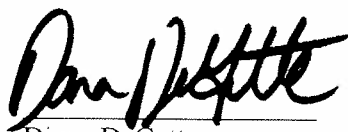
Sincerely,



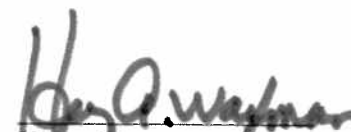
Nita M. Lowey
Member of Congress



Louise M. Slaughter
Member of Congress



Diana DeGette
Member of Congress



Henry Waxman
Member of Congress

cc: Department of Health and Human Services Secretary Michael Leavitt
President George W. Bush

Ann Ann

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Wm. Lucy Clay

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Emmanuel Ayer ✓
John D. Hoffman Rottman (W)

Yvette W. Clarke

Christopher Shays

Alaine E. Watson

Carol Stea-Power

Jon Schenkouly

Russ Holt

Tom Puller

Patrone

Rosalee Adams

James M. Becerra

Archie J. Sims

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Abercrombie	Neil	HI
Ackerman	Gary	NY
Allen	Tom	ME
Andrews	Robert	NJ
Arcuri	Mike	NY
Baca	Joe	CA
Baird	Brian	WA
Baldwin	Tammy	WI
Bean	Melissa	IL
Becerra	Xavier	CA
Berkley	Shelly	NV
Berman	Howard	CA
Bishop	Tim	NY
Bishop	Sanford	GA
Blumenauer	Earl	OR
Braley	Bruce	
Brown	Corrine	FL
Capps	Lois	CA
Capuano	Mike	MA
Carnahan	Russ	MO
Carson	Andre	FL
Castor	Kathy	
Cohen	Stephen	
Crowley	Joe	NY
Davis	Susan	CA
Davis	Danny	IL
DeGette	Diana	CO
Delahunt	William	MA
DeLauro	Rosa	CT
Dicks	Norm	WA
Edwards	Donna	
Emanuel	Rahm	IL

Engel	Eliot	NY
Farr	Sam	CA
Fattah	Chaka	PA
Filner	Bob	CA
Giffords	Gabrielle	AZ
Gillibrand	Kirsten	NY
Gonzalez	Charlie	
Green	Gene	TX
Green	Gene	TX
Grijalva	Raul	AZ
Hall	John	NY
Harman	Jane	CA
Higgins	Brian	NY
Hincheey	Maurice	NY
Hirono	Mazie	
Hodes	Paul	NH
Hooley	Darlene	CA
Inslee	Jay	WA
Israel	Steve	NY
Jackson, Jr	Jesse	IL
Johnson	Hank	GA
Kind	Ron	WI
Larsen	Rick	WA
Lee	Barbara	CA
Levin	Sander	MI
Lewis	John	GA
Loebsack	Dave	IA
Lofgren	Zoe	CA
Lowey	Nita	NY
Maloney	Carolyn	NY
Matsui	Doris	CA
McCarthy	Carolyn	NY
McCollum	Betty	MN
McDermott	Jim	WA

McGovern	Jim	MA
McNerny	Jerry	CA
Miller	Brad	NC
Miller	George	CA
Mitchell	Harry	AZ
Moore	Gwen	WI
Moore	Dennis	KS
Moran	James	VA
Murphy	Patrick	
Murphy	Chris	
Nadler	Jerry	NY
Napolitano	Grace	CA
Pallone	Frank	NJ
Pallone	Frank	NJ
Pascarell	Bill	NJ
Pastor	Ed	AZ
Payne	Donald	NJ
Price	David	NC
Robal-Allard	Lucille	CA
Rothman	Steve	NJ
Ruppersberger	Dutch	MD
Rush	Robert	IL
Sanchez	Linda	CA
Schakowsky	Jan	IL
Schiff	Adam	CA
Schwartz	Allyson	PA
Serrano	Jose	NY
Shea-Porter	Carol	
Sires	Albiro	NJ
Slaughter	Louise	NY
Smith	Adam	WA
Solis	Hilda	CA
Sutton	Betty	OH
Tauscher	Ellen	CA

Thompson	Mike	CA
Towns	Ed	NY
Tsongas	Niki	MA
Udall	Mark	CO
Van Hollen	Chris	MD
Walz	Tim	
Wasserman-Shultz	Debbie	FL
Watson	Dianne	
Watt	Mel	NC
Waxman	Henry	CA
Weiner	Anthony	
Welch	Peter	VT
Wexler	Robert	FL
Woolsey	Lynn	CA